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87-502

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARCO OIL AND GAS COMPANY, DIVISION OF ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

WILLISTON BASIN INTERSTATE PIPELINE COMPANY AND FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The court below held that it lacked jurisdiction to review orders of the Federal Energy Regulatory Commission ("Commission") designating certain formations as "tight formations" eligible for incentive natural gas pricing. These orders were issued under Sections 107(b) and 107(c)(5) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3417(b) and (c)(5), and rulemaking authority under Section 501 of the NGPA, 15 U.S.C. § 3411. The court's conclusion was based upon Section 503 of the NGPA, 15 U.S.C. § 3413, which prohibits judicial review of certain types of Commission orders issued under that section. The questions presented are:

1. Whether the court of appeals' construction of a major incentive-pricing provision of the NGPA is inconsistent with the language and legislative history of Sections 107(b), 107(c)(5), and 503; erroneously limits Commission rulemaking authority under Section 501; and fails to apply principles stated by this Court controlling judicial and agency interpretations of regulatory statutes.

2. Whether the court of appeal's narrow construction of the Commission's rulemaking authority under Section 501 of the NGPA is in conflict with the broad reading of that section by other courts of appeals.

3. Whether the court's construction of the NGPA conflicts in principle with decisions of this Court recognizing broad adminstrative agency rulemaking powers and providing for deference to agency interpretations where there is "ambiguity" or silence as to intent of Congress in the statute and legislative history.

PARTIES TO THE PROCEEDING

Petitioner ARCO Oil and Gas Company, Division of Atlantic Richfield Company ("ARCO"), is an independent producer and seller of natural gas and sells natural gas to respondent Williston Basin Interstate Pipeline Company ("Williston").*

Respondent Williston is an interstate pipeline company subject to the jurisdiction of the Federal Energy Regulatory Commission. Williston purchases natural gas from ARCO pursuant to contracts assigned by Montana-Dakota Utilities Company and is a part of the MDU Resources Group, Inc.

Respondent Federal Energy Regulatory Commission is the federal agency responsible for regulating certain sales and transportation of natural gas under the Natural Gas Act of 1938, 15 U.S.C. §§ 717, *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301, *et seq.*

The American Gas Association appeared below as *amicus curiae* in support of respondent Williston.

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* In accordance with Rule 28.1, ARCO's list of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates is set forth in App., 212a.

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IN THE

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No. ———

ARCO OIL AND GAS COMPANY, DIVISION OF ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

WILLISTON BASIN INTERSTATE PIPELINE COMPANY AND FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARCO Oil and Gas Company, Division of Atlantic Richfield Company ("ARCO"), hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the court of appeals (App., 1a-13a) was issued on April 24, 1987, and is reported at 816 F.2d 777 (D.C. Cir. 1987).[1] The court's orders denying

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[1] The Appendices to this Petition are contained in a separate volume.

Williston's petition for rehearing and suggestion for rehearing *en banc* (App., 80a, 81a) were issued on June 30, 1987. The court's letter to the Commission in lieu of formal mandate (App., 82a) was issued on July 15, 1987.

Order Nos. 338 and 338-A (App., 14a-28a) of the Federal Energy Regulatory Commission ("Commission") on review are reported at 48 Fed. Reg. 46268 (Oct. 12, 1983), FERC Statutes and Regulations (CCH) ¶ 30,505 (1983), and 33 F.E.R.C. (CCH) ¶ 61,175 (1985), respectively. The orders of the Commission issuing the underlying regulations involved are Order Nos. 99 and 99-A (App., 29a-77a), and are reported at 45 Fed. Reg. 56034 (Aug. 10, 1980), FERC Statutes and Regulations (CCH) ¶ 30,183 (1980), and 45 Fed. Reg. 71563 (Oct. 29, 1980) FERC Statutes and Regulations (CCH) ¶ 30,198 (1980).

JURISDICTION

The judgment of the court was entered on April 24, 1987 (App., 78a). The court's orders denying the petition for rehearing and suggestion for rehearing *en banc* were issued on June 30, 1987 (App., 80a, 81a).

This Court has jurisdiction pursuant to Section 506(a)(4) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3416(a)(4), and to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

Sections 107, 501, 503 and 506 of the NGPA, 15 U.S.C. §§ 3317, 3411, 3413, and 3416, are set forth at App., 83a-97a. Part 271, Subpart G, of the Regulations under the Natural Gas Policy Act, 18 C.F.R. §§ 271.701, *et seq.*, is set forth at App., 98a-211a.

STATEMENT OF THE CASE

This case involves jurisdiction of the courts of appeals to review Commission orders affirming recommendations by a state or federal agency having jurisdiction over the production of natural gas that certain producing formations are "tight formations" under the Commission's regulations implementing Sections 107(b) and 107(c)(5) of the NGPA (App., 2a-4a). The court below concluded, *sua sponte*, that it had no jurisdiction to review orders approving "jurisdictional agency" recommendations and did not reach the issues raised by petitioner below Williston Basin Interstate Pipeline Company, formerly Montana-Dakota Utilities Company ("Williston"), which sought reversal of the Commission's orders (App., 12a-13a).[2]

1. *Statutory Background.* In Title I of the NGPA, Congress established maximum ceiling prices for various categories of natural gas with detailed definitions in the statute. However, in Section 107, Congress also authorized the Commission to prescribe "by rule or order" higher incentive ceiling prices for the sale of "any high-cost natural gas" "to the extent that such special price is necessary to provide reasonable incentives for the production of such high-cost natural gas."[3] The term "high-cost natural gas" was defined to include "natural gas determined in accordance with Section 503 to be . . . produced under such other conditions as the Commission determines to present extraordinary risks or costs."[4]

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[2] Williston Basin Interstate Pipeline Company is part of the MDU Resources Group, Inc. and purchases gas from ARCO under contracts that Montana-Dakota Utilities Company, also part of the MDU Resources Group, assigned to Williston. For simplicity, all of these entities are referred to herein as "Williston."

[3] Section 107(b), 15 U.S.C. § 3317(b) (App., 83a).

[4] Section 107(c)(5), 15 U.S.C. § 3317(c) (App., 83a-84a).

Under its rulemaking authority in Section 501, in 1980 the Commission issued Order No. 99 to implement Sections 107(b) and (c)(5) (App., 29a-70a).[5] The Commission there exercised the discretion granted in Sections 107(b) and 107(c)(5) and prescribed gas produced from "tight formations" as a new category of "high-cost natural gas."[6] Procedurally, the Commission established a two-step process for determining if natural gas is produced from qualifying "tight formations":

(1) The first step was the recommendation by a state or federal agency having jurisdiction over production that a specific producing formation qualified as a "tight formation" under criteria prescribed by the Commission (App. 33a).[7] This recommendation was to be made upon an application to the state or federal agency for designa-

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[5] *Regulations Covering High-Cost Natural Gas Produced from Tight Formations,* Order No. 99, 45 Fed. Reg. 56034 (Aug. 22, 1980), FERC Statutes and Regulations (CCH) ¶ 30,183 (1980), *reh'g den.* "Order Denying Rehearing and Clarifying Order No. 99," Order No. 99-A, 45 Fed. Reg. 71563 (Oct. 29, 1980), FERC Statutes and Regulations (CCH) ¶ 30,198 (1980) (App., 71a-77a), *aff'd, Pennzoil Co.* v. *FERC,* 671 F.2d 119 (5th Cir. 1982). In Order No. 99, the Commission stated its support for ". . . the national policy to encourage production of natural gas from unconventional sources that can be put into production only at extraordinary risk or cost," 45 Fed. Reg. at 56034 (App., 30a), and estimated that ". . . the gas recoverable in tight formations might equal the amount of proven domestic conventional reserves." 45 Fed. Reg. at 56035 (App., 31a).

[6] During consideration of the NGPA in 1978, Congress recognized that production from tight formations required producers to undertake "extraordinary risks or costs." H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 87 (1978).

[7] Order No. 99 prescribed extensive substantive technical regulations for "tight formation" designations (App., 34a-35a, 58a, 62a-68a). The guidelines concern permeability, porosity, gas productivity before stimulation of the reservoir, and any prior infill drilling authorizations. *See* 45 Fed. Reg. 56035, 56043-44, 56045, and regulations at App., 98a-103a.

tion of the specific formation as an eligible "tight formation." After proceedings to review the application, the agency's recommendation was transmitted to the Commission, which conducted a notice-and-comment rulemaking proceeding pursuant to Sections 107(b), 107(c)(5), and 501 (App., 104a). Following the rulemaking proceeding, the Commission issued orders either approving or disapproving the jurisdictional agency's recommendation for the formation (App., 104a). Approved formations are designated as eligible "tight formations" under Section 107(b) and included in the regulations for pricing under Section 107(c)(5) (App., 104a-211a).

(2) The second step in the process requires the subsequent application to the jurisdictional agency by a producer under Section 503 for determination that a specific producing well in a designated "tight formation" qualifies under Section 107(c)(5) (App., 35a-36a). Under Section 503, the jurisdictional agency then determines this different question of whether gas produced from the specific well or wells is produced from an eligible "tight formation" (App., 86a).[8] The agency's well

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[8] Section 503(c), 15 U.S.C. § 3413(c), provides that unless it waives its authority, the state or federal agency with jurisdiction over production of natural gas is to determine whether the definition of "high-cost natural gas" under section 107(c) applies to production from a specific well. Section 503(a)(1)(D), (App., 86a). These determinations are to be made ". . . in accordance with the procedures generally applicable to such agency for the making of such determinations or comparable determinations under the provisions of Federal or State law, as the case may be, pursuant to which they exercise their regulatory jurisdiction," although the Commission is permitted to prescribe the form and content of filings with the agencies. *See* Section 503(c)(3), 15 U.S.C. § 3413(c)(3) (App., 89a-90a). The Commission's regulations fixed the maximum incentive price at 200 percent of the maximum lawful price under section 103 of the NGPA, but prohibited collection of the incentive price unless there exists a "negotiated contract price" expressing the purchaser's agreement to pay it. *See* 45 Fed. Reg. 56041; 18

determination then is reviewed by the Commission under Section 503(b) (App., 87a-88a). A Commission decision under Section 503 is subject to judicial review only if the Commission has reversed or remanded the jurisdictional agency's well determination.[9]

2. *Administrative Proceedings.* In 1962, as later amended in 1981, ARCO and Williston entered into a contract covering sales of natural gas produced from certain leases in the Wind River Indian Reservation covering parts of the Frontier Formation and Dakota Group in Wyoming. Williston agreed in the 1981 amendment to pay ARCO the incentive price for specific gas qualifying as "tight formation gas" under Section 107(c)(5) for wells drilled in 1981 and thereafter.[10]

In June 1982, ARCO filed the "first step" applications for designating portions of these producing formations as "tight formations" under the statute and Commission regulations (App., 15a, 20a). The applications were filed with the Wyoming Oil and Gas Commission, but were considered by the Department of the Interior's Minerals Management Service ("MMS") because the lands are Indian tribal lands. After a hearing held jointly by MMS and the Wyoming Commission, MMS (which was succeeded by the Bureau of Land Management ("BLM")) transmitted to the Commission findings and recommendations that the Frontier Formation and Dakota Group be designated as "tight formations" in accordance with the regulations under Section 107(b) (App., 15a, 20a).

C.F.R. § 271.702(a)(1) and 18 C.F.R. §§ 271.703(a)(1) and (2) (App., 98a, 99a).

[9] *See* App., 88a, 90a, and *Mesa Petroleum Company* v. *FERC*, 688 F.2d 1014 (5th Cir. 1982).

[10] This amendment meets the requirements in the Commission regulations for a negotiated agreement to pay the Section 107(c)(5) incentive price. *See* App., 98a, 99a.

Acting under Section 501 of the NGPA [11]—its general rulemaking authority—the Commission issued a Notice of Proposed Rulemaking on these recommendations (App., 15a). Williston filed "comments" and data in opposition, and the Commission staff forwarded this and other information to the BLM, as the successor to MMS, for review and comment. BLM submitted an extensive response to the Commission adhering to the previous findings and recommendations of the MMS (App., 15a-19a).

In these rulemaking proceedings, the Commission then issued its Order No. 338 [12] approving the recommendations of BLM to designate as "tight formations" the Frontier Formation and Dakota Group under Section 107(b) and the applicable regulations (App., 14a-19a). The Commission addressed and rejected all of the opposing arguments of Williston and concluded that the record supported the jurisdictional agency recommendations that the formations met the standards and guidelines in the regulations. The Commission then amended its regulations to include these formations as eligible "tight formations." *See* App., 14a, 19a, and App., 98a, 185a-187a. The Commission, by Order No. 338-A,[13] thereafter denied rehearing and stay of its order which Williston had sought. Williston then filed its petition for review of the Commission's orders (App., 2a-4a).

3. *The Decision Below.* The court of appeals did not address any of Williston's arguments that the orders

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[11] 15 U.S.C. § 3411 (App., 85a).

[12] *High-Cost Gas Produced From Tight Formations (Wyoming-14 and Wyoming-15)*, Order No. 338, 48 Fed. Reg. 46268 (Oct. 12, 1983), FERC Stats. and Regs. (CCH) ¶ 30,505 (1983) (App., 14a-19a).

[13] *High-Cost Gas Produced from Tight Formations (Wyoming-14* and *Wyoming-15)*, "Order Denying Request for Rehearing and Petition to Reopen and Remand," Order No. 338-A, 33 F.E.R.C. (CCH) ¶ 61,175 (1985) (App., 20a-28a).

should be reversed (App., 4a). Instead, the court dismissed the petition for lack of jurisdiction (App., 4a, 12a-13a). The court reasoned (i) that Section 503 of the NGPA controlled Commission review of agency determinations; (ii) that, as decided in *Mesa Petroleum Company* v. *FERC*, 688 F.2d 1014 (5th Cir. 1982), under Section 503, judicial review is available only if the Commission reverses or remands an agency's determinations; and (iii) that judicial review is not available if, as here, the Commission approves the agency determinations (App., 10a-12a).

The court focused on Sections 503(b)(4) and (c)(4) to support its conclusion:

> "This distinction is embodied in sections 503(b)(4)(B) and (c)(4) of the NGPA: the latter provision states that jurisdictional agency determinations 'shall not be subject to judicial review under any Federal or State law except as provided in subsection [503(b)]' which, at paragraph (4)(B), provides for judicial review only when FERC *reverses* a jurisdictional agency recommendation. In such a case, the court is itself supposed to review the jurisdictional agency's determinations, not those of FERC, and is itself supposed to apply the substantial evidence test." [14]

All parties below, including Williston, ARCO, the *amicus curiae* American Gas Association, and the Commission, took the position that Section 503 and *Mesa* were inapplicable (App., 8a). The parties contended that judicial review of orders in the "first step" involving the "tight formation" designation is authorized under Section 506 of the NGPA because this step is based upon (i) the Commission's powers to issue rules and orders under Sections 107(b) and 107(c)(5); (ii) its rulemaking powers under Section 501 of the NGPA; and (iii) the absence of any prohibition upon judicial review

[14] App., 7a-8a (emphasis in original; footnotes omitted).

under these sections (App., 8a-10a). The court, however, stated that the Commission relies upon Section 503:

> ". . . only in making a secondary determination of whether particular wells on a previously designated tight formation are entitled to incentive pricing (the basic question being the date on which the well was drilled)." [15]

The court then considered whether the Commission's interpretation of the statute conflicted with the "unambiguous" intent of Congress (App., 10a). On this question, the court said that Congress drafted Section 503 as a legislative compromise and made reference in Section 107(c) to define high-cost natural gas and to the inclusion of Section 107(c) for well determinations under Section 503 (App., 11a-12a). According to the court (App., 12a), the position of the parties that the Commission could act pursuant to Sections 107(b), 107(c)(5), and 501:

> ". . . renders section 503 nothing more than a mere suggestion from Congress for FERC to take or not as it likes. We cannot ascribe to Congress, which had explicitly rejected alternative procedures in favor of the detailed and extensive procedure in the statute, the intention of simply providing FERC with a possible approach to granting NGPA designations."

The court concluded that judicial review of "tight formation" designations is available only as provided in Section 503(b), and, therefore, that it was without jurisdiction to review the orders which had approved the "tight formation" recommendations of the jurisdictional agencies (App., 12a-13a).

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[15] *Id.*, 9a (footnote omitted). The court quoted from the Commission's interim rule preceding Order No. 99 where the Commission stated that Section 503 applied only to well category determinations and did not constrain it in reviewing initial tight formation designations, and to the Commission's reiteration of this interpretation in Order No. 99-A. *Id.* at 9a n.31.

Williston petitioned for rehearing of the court's decision and suggested rehearing *en banc*, but the court denied the petition and suggestion by orders issued June 30, 1987 (App., 80a, 81a).

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals Has Misconstrued Sections 107, 501, And 503 Of The Natural Gas Policy Act, Limited Commission Rulemaking Power, And Failed To Apply Principles Stated By This Court For Statutory Construction And Agency Interpretation Of Statutes.

1. In the NGPA, Congress sought to cure shortages of the 1970s and provide incentive prices to assure adequate natural gas supplies.[16] To accomplish this goal, Congress set up eight categories of prices.[17] The method of administering these statutory sections differ, and the distinctions are critical here.

For seven categories and four sub-categories of the eighth, Congress set forth express definitions.[18] For four of the eight categories, Congress prescribed that only the Commission would determine the classification of specific wells or contracts.[19] For certain other categories, Congress provided in Section 503, that state or federal jurisdiction agencies may make initial "determinations" of eligibiilty of specific well production for a category by applying the statutory definitions, and these are the "determinations" which are subject to Commission approval, remand, or reversal under Section 503.[20]

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[16] *See Public Service Commission* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983).

[17] Sections 102-109, 15 U.S.C. §§ 3312-3319.

[18] Sections 102, 103, 104, 105, 106, 107(c)(1)-(4), 108, and 109, 15 U.S.C. §§ 3312, 3313, 3314, 3315, 3316, 3317(c)(1)-(4), 3318, and 3319.

[19] Sections 104, 105, 106, and 109.

[20] Sections 102(c), 102(d), 103(c), 107(c), and 108(b).

Sections 107(b) and (c)(5) differ significantly from all the other categories. Congress did not prescribe a maximum lawful price or specific statutory definitions in Sections 107(b) and (c)(5). Instead, Section 107(b) permits the Commission, "by rule or order," to prescribe higher maximum incentive price prices ". . . if necessary to provide reasonable incentives for the production of high-cost natural gas." 15 U.S.C. § 3317(b) (App., 83a). Both the categories and prices were left to the Commission's discretion for determination under Section 107(b). Eligibility of specific gas or wells for such "high-cost" gas maximum lawful prices is to be "determined in accordance with section 503" *and* Section 107(c)(5) as gas

> "(5) produced under such other conditions *as the Commission determines to present* extraordinary risks or costs." 15 U.S.C. § 3317(c)(5) (emphasis supplied) (App., 83a-84a).

The implementation of Sections 107(b) and 107(c)(5) thus was left solely to Commission discretion. The Commission therefore issued its Order Nos. 99 and 99-A (App., 29a-77a) under Section 107(b) and its rulemaking powers under Section 501. 15 U.S.C. § 3411 (App., 85a). Under those powers, as discussed *supra*, the Commission prescribed the new category of "high-cost gas" produced from "tight formations," the extensive substantive regulations to identify eligible formations, and the procedures for designation of such formations. *See* App., 29a-77a, and 18 C.F.R. § 271.701, *et seq.* (App., 98a-211a).[21]

Under these same powers, the Commission provided (i) for the "first-step" applications for the "tight formation" designations to be filed with the state and federal jurisdictional agencies; (ii) for those agencies submit their recommendations to the Commission; and (iii) for the Commission, after the rulemaking procedures under

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[21] As noted *supra*, the Commission also required a "negotiated contract" agreeing to pay the Section 107(c)(5) price. The contract amendment of December 10, 1981, between ARCO and Williston met this requirement. *See* page 6 and n.10, *supra*.

Section 501, to approve or disapprove these agency recommendations. Also under the same powers, the Commission correctly provided that the "second step" applications for qualification of production from specific wells in a designated tight formation under Section 107(c)(5) are to be filed subsequently with the jurisdictional agencies under Section 503, 15 U.S.C. § 3413 (App., 86a), and separate regulations at 18 C.F.R. § 274.101, *et seq.*

These regulations, contrary to the court's holding, are consistent with the NGPA.

2. After its call for briefs, *sua sponte*, on the question of jurisdiction in light of *Mesa Petroleum Co.* v. *FERC*, 688 F.2d 1014 (5th Cir. 1982), the court below, nevertheless, concluded that Section 501 did not permit designation of the "tight formations" under the procedures adopted. With scant reference to Sections 107(b) and 107(c)(5), the court of appeals held Section 503 applied to the granting of "high-cost designations,"[22] and said the Commission could not "avoid" Section 503 by relying on Section 501. The court made no considered analysis of the language or legislative history of Section 107(b) and Section 107(c)(5) by which Congress permitted the Commission to develop new categories of high-cost gas and procedures for their determination by rules under Section 501, and did not provide for or require the use of Section 503 for these purposes.

Treating the agency "tight formation" designations as if they were made under Section 503, however, the court thus reached its conclusion of no jurisdiction to review the Commission tight formation designation orders that had approved the jurisdictional agency's designation

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[22] Contrary to the court's wording, Section 503(a)(1) uses the term "determination," referring to well-specific determinations. Section 503(a)(1) does *not* use the term "high-cost designations" as stated by the court. *Cf.* 15 U.S.C. § 3143(a) and App., 11a.

recommendations—a result reached only as to a Section 503 specific well-determination in *Mesa.*[23]

The court of appeals stated that its conclusion was reached under principles set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984), but its analysis was not in accordance with those principles. There is no statutory language or legislative history supporting the court's view that the intent of Congress was so "unambiguously expressed" (App., 10a-11a). Its analyses are not consistent with the statute, the skimpy legislative history cited, or the deference to be accorded to interpretation by an agency administering the statute under these regulations for over seven years, as contemplated by *Chevron.*

3. As to the statute, there can be no dispute that the Commission is accorded broad rulemaking powers under Section 501, 15 U.S.C. § 3411 (App., 85a), or that Sections 107(b) and 107(c)(5) can be implemented only by the exercise of the Commission's discretionary authority (App., 83a). Neither Section 107(b) nor Section 107(c)(5) provides for a "jurisdictional agency" to initiate exercise of such Commission authority under these sections.

Similarly, the language of Sections 107(b) and (c)(5) and the provisions for specific well-determination procedures in Section 503(1)(D) are, on their face, consistent with the Commission's procedures: (i) exercise of Commission authority under Sections 107(b), 107(c)(5), and 501 to prescribe the substantive standards and procedures to determine "tight formations" designations, including the use of the jurisdictional agencies in that process; and (ii) the use of Section 503, as contemplated by Sections 107(c)(5) and 503(a)(1)(D), *thereafter* to determine whether specific wells produce gas from a "tight forma-

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[23] The court of appeals stated: "We do not need to determine the procedure that FERC actually substituted for the statutory procedure is in any way defective except insofar it purports to culminate in an order reviewable in court" (App., 12a n.36).

tion" designated previously under Sections 107(b), 107 (c)(5), and 501.

The language of the statute, therefore, clearly supports the Commission's interpretation. Section 503 does *not* control the method of implementing Sections 107(b) and 107(c)(5). Under the *Chevron* principles, Congress left this area for the Commission's exercise of its Section 501 powers. Otherwise, Sections 107(b) and 107(c)(5) could never be implemented—a result obviously not contemplated by Congress.

4. The only legislative history cited by the court of appeals to support its conclusions are limited excerpts from references to Section 503 in the Conference Report, H.R. Rep. No. 1752 at 116-117 (App., 6a n.20 & n.22, 10a-11a). The excerpts, however, refer only to disagreements between the two Houses, and the entirety of the discussion does not support the court's interpretation. Section 503 was drawn to resolve differences in the two bills and refers to the agency's "factual determinations" about classification of specific wells under Sections 102, 103, 107, and 108 (App., 86a).

These are "subsidiary determinations" of the category classification of specific wells. Section 503 thus refers to the jurisdictional agency's application of definitions in the statutory sections, *as these definitions may be further determined by the Commission.*[24] The Conference Report is silent as to these agencies' participation in development of *category* definitions or implementation of Sections 107(b) and 107(c)(5), under Commission rules issued under Section 501.

Nevertheless, the court erroneously concludes that Congress stated that Section 503 procedures "apply to the granting of the incentive-price designations, including 'high-cost natural gas' designations" (App., 11a). However, as shown *supra*, neither the Conference Report nor

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[24] H.R. Rep. No. 95-1752 at 116-120.

Section 503(a) refers to such "designations." Both refer only to "determinations" applying statutory or Commission-prescribed definitions.

The court of appeals did not refer to Congress' statements concerning its intent in Sections 107(b) and 107(c)(5). The Conference Report states:

> "The Commission may determine that . . . *natural gas produced from tight formations with little permeability, including Western tight sands formations*[,] . . . *qualif*[*ies*] *as natural gas produced under such other conditions as present extraordinary risks or costs.* The conference agreement gives the Commission authority to add other *categories of natural gas production to the list which qualifies for special treatment under* this section." *Id.* at 87 (emphasis supplied).

Therefore, any "ambiguity" in statutory language or legislative history is answered by reading Sections 107(b), 107(c)(5), and Section 503(a)(1)(D) in tandem with Section 501.[25] The court of appeals' analysis, however, is based on erroneous application of the *Chevron* tests, the only authority cited. "Unambiguous" intent cannot be found to support the court's conclusion as to Section 503 in either the NGPA or the cited legislative history.

5. The first question under the *Chevron* tests that should have been addressed below was whether Congress had spoken directly on *"the precise question at issue."* 467 U.S. at 842.

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[25] Section 501(a), 15 U.S.C. § 3411(a), provides in pertinent part:

> "The Commission, or any other federal officer or agency in which any function under this Act is vested or delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act" (App., 85a).

The precise question, in reality, is whether under Section 501, the Commission (i) may make use of the state or federal agencies in the "tight formation" designation process required by Sections 107(b) and (c)(5); and (ii) consistent with Section 503(a), provide for the *later* specific well-determinations in qualifying formations under Section 503(a)(1)(D). Proper statutory construction requires that Sections 107(b), 107(c)(5), 501 and 503, be so read together. Such a reading means that these provisions operate without conflict or gaps and establishes that the Commission's interpretation is correct.

Under *Chevron*, if Congress did not so clearly address the *precise* question of implementing Sections 107(b) and 107(c)(5), the court cannot simply impose its own construction. Here, however, the court misread Section 503 and then treated Section 503(a)(1)(D) as limiting Commission discretionary powers under Sections 107(b), 107(c)(5), and 501 when no such "unambiguous" limitation can be found in the statute or in the cited legislative history.[26]

Rather, *Chevron* requires that if the legislative intent is not stated or is unclear upon the precise question, a court then must decide whether the agency's interpretation is permissible, with weight to be accorded to that interpretation. 467 U.S. at 843. Where the agency is empowered by rulemaking to exercise discretion and to fill in any gaps or "ambiguities" left by Congress, as the Commission is authorized here, its regulations may be given controlling weight. 467 U.S. at 843-844. This principle is applicable even where silence or a gap is "implicit," in which instance, the court also may not sub-

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[26] The Commission does not "avoid" Section 503 by (i) using Section 501 procedures, with participation by the jurisdictional agencies, to apply Sections 107(b) and 107(c)(5) regulations, pass on generic recommendations, and approve or disapprove eligible tight sands formations, and (ii) then providing for application of the Section 107 designations by the jurisdictional agency for specific well determination under Section 503. *Cf.* App., 12a. This is

stitute its construction to supplant the reasonable interpretation by the agency. 467 U.S. at 844.[27]

These principles were not properly applied by the court below. The answer of the court to the question of jurisdiction to review rests solely on its unsupported misreading of Section 503. The court makes but a passing reference to the controlling provisions in Sections 107(c)(5) and 501, and finds "unambiguous intent" where none appears in the statute or legislative history. The result is that the court reached a conclusion that is inconsistent with these sections and proper application of the *Chevron* tests.

Here, the NGPA obviously provides for Commission implementation of Sections 107(b) and 107(c)(5) "by rule or order." The court failed to follow the guidelines of *Chevron* and subsequent cases and did not recognize the breadth of this express statutory authority. The court gave *no* consideration to the Commission's rationale and *no* weight whatsoever to the Commisison's permissible interpretation. Section 501 and the Commission's interpretation were simply brushed aside (App., 11a, 12a).

6. In Order Nos. 99 and 99-A (App., 60a-61a, 72a-73a), the Commission gave ample reasons for proceeding under Section 501 during the "first step" of the process and for not using the case-by-case approach of Section 503 in the "tight formation" designation process (App., 60a-61a, 72a-73a). The Commission interpretation and

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wholly consistent with the functions of the jurisdictional agencies under other sections listed in Section 503(a)(1). *See* App., 86a.

[27] *See also Clarke* v. *Securities Indus. Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 14-15; *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, No. 85-954 (June 30, 1986), slip op. 11; *Young* v. *Community Nutrition Inst.*, 476 U.S. 974 (1986); *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985); *Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116, 125 (1985); *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982).

the regulations there promulgated have been in effect for some eight years, and the Commission has designated some 200 eligible "tight formations" under Sections 107 (b) and 107(c)(5) under these rulemaking procedures (App., 104a-211a). These designations have been followed by hundreds of individual well-determinations under Section 503, as contemplated by Congress. Nevertheless, the Commission's interpretation and this long history in administering the statute were accorded no weight whatsoever by the court, contrary to *Chevron* and subsequent cases.

The importance of this case thus is reflected (i) by the courts of appeals' misinterpretations of key sections of the NGPA on an important federal question not previously directly addressed by any court; (ii) its narrow, limiting construction of the Commission's broad rulemaking power under Section 501; (iii) its failure to follow controlling principles of *Chevron* and subsequent cases; and (iv) impact of its decision upon one of the major incentive-pricing provisions in the NGPA.[28]

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[28] On July 29, 1987, by Order No. 479, the Commission modified its regulations prospectively to provide for the initial step of tight formation designations by jurisdictional agencies under Section 503, with subsequent Commission review under Section 503. 52 Fed. Reg. 29003 (Aug. 5, 1987). In specific cases, the Commission has also stated its intention not to apply the holding below retroactively, but that action also has been drawn into question. *See Colorado Oil and Gas Conservation Commission* (*The Dakota and Morrison Formations, Garfield and Mesa Counties*), Docket No. GP87-64-000, "Order Permitting Jurisdictional Agency Determination to Become Final" (Jul. 29, 1987) (unreported); *Oklahoma Corporation Commission, et al.*, "Notice of Preliminary Findings" (Jul. 29, 1987), 52 Fed. Reg. 29242 (Aug. 6, 1987); *Texas Railroad Commission, Travis Peak Formation*, "Notice of Preliminary Finding and Order Terminating Hearing" (Jul. 29, 1987), 52 Fed. Reg. 29245 (Aug. 6, 1987); "Request of Travis Peak Producers Group for Rehearing of Notice of Preliminary Finding and Order Terminating Hearing," filed August 28, 1987 in *Texas Railroad Commission, Travis Peak Formation*, JD87-16439T, Docket No. GP87-27-000. In addition, on June 30, 1987, Williston filed suit against the BLM, MMS, the De-

II. The Decision Below Conflicts With Decisions Of Other Circuits As To The Scope Of Commission Rulemaking Power Under Section 501 To Implement The NGPA.

The scope of Commission rulemaking authority under Section 501 has been broadly construed by other courts of appeals. The narrow construction accorded by the court below conflicts with those constructions.

This conflict is particularly true where the precise questions at issue involved (i) an absence of Congressional expression as to the relationship of Section 503 with Section 107(b); (ii) no Congressional prescription of a method for implementing Sections 107(b), 107(c)(5), and 503(a)(1)(D) together; and (iii) no Congressional prescription of the method to be used for exercise of Commission powers under Sections 107(b) and 107(b)(5), except by exercise of rulemaking authority under Section 501.

In *Pennzoil Co.* v. *FERC*, 671 F.2d 119 (5th Cir. 1982), the Fifth Circuit reviewed Order Nos. 99 and 99-A which promulgated these regulations for "tight formation" designations (App., 29a-77a). The issue involved the Commission's requirement that there must be a "negotiated" agreement to pay the Section 107(c)(5) price.[29] The Fifth Circuit upheld this part of the regulation, and significantly also stated:

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partment of the Interior, and the Federal Energy Regulatory Commission to have the "tight formations" designations and orders in this case declared null and void, predicating the theory of its suit in part upon the validity of holding below. *Williston Basin Interstate Pipeline Company and MDU Resources Group, Inc.* v. *Robert L. Burford, Director, Bureau of Land Management, et al.*, No. CA87-1757 (D.D.C. filed June 29, 1987).

[29] The question of jurisdiction raised by the court below, *sua sponte*, was not raised by the parties or the Fifth Circuit in *Pennzoil*. Notably, the same panel which decided *Pennzoil* decided *Mesa Petroleum Company* v. *FERC*, 688 F.2d 1014 (5th Cir. 1982). In *Mesa*, the court held that a Commission well-determination under

> "The regulation under attack was promulgated in response to the Congress' express direction to create a scheme providing reasonable incentives for the development of gas from unconventional sources. The authority delegated by Congress was broad indeed: responsibility for both the identification of gas to which such incentives should be extended and the determination of the appropriate maximum lawful incentive price devolved upon FERC. Sparse guidelines incorporated in the statutory mandate established only the broad parameters of regulation. The remainder was left to FERC's reasoned application of its considerable experience and accrued expertise." 671 F.2d at 126 (footnote omitted).

The Fifth Circuit further stated that "[j]udicial review of regulatory actions in fulfillment of this congressional mandate must accord to FERC that deference implied by such a broad authorization." 671 F.2d at 126. On these premises, the attacks there were rejected, reflecting recognition of the valid exercise of Commission rulemaking power under Section 501 to implement Sections 107(b) and (c)(5).

Section 501 is intended to be a broad delegation of rulemaking authority, as the Fifth Circuit's decision reflects. As further stated in the Conference Report, Section 501 provides the Commission with authority ". . . to issue rules and orders under this Act, and to perform any and all acts as it may find necessary or appropriate to carry out the provisions of this Act."[30] An express delegation to the Commission thus was given under Section 107(b), but the method of exercise of the Sections 107(b) and 107(c)(5) delegation were not stated either explicitly or implicitly. Therefore, deference should have been given to the Commission's exercise of its rulemak-

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Section 102(d) and Section 503 which became final and was neither reversed nor remanded by the Commission was not subject to judicial review.

[30] H.R. Rep. No. 95-1752 at 116.

ing power, and its regulations upheld as neither arbitrary nor capricious and as reasonable constructions of the NGPA.[31]

The NGPA has been described as a "highly-complex piece of legislation, with provisions" reflecting Congressional intent to provide the Commission with an active role in administering the Act. *Petrolite Corporation Bareco Division* v. *FERC*, 667 F.2d 664 (8th Cir. 1981). For that reason, the courts have accorded great weight to Commission constructions and deference to it in prescribing rules under Section 501.[32]

Section 501, in pertinent part, is identical to Section 16 of the Natural Gas Act, 15 U.S.C. § 717o. Both statutes provide for authority "to perform any and all acts . . . and to prescribe issue, amend and rescind such rules and

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[31] In its analysis, the court below did not recognize the necessity for the Commission's "first step" action under Section 501 to implement Sections 107(b) and 107(c)(5) *prior to* the "second step" *application* of the Commission's designated tight formations to well-determinations by a jurisdictional agency under Section 503. Its description of Section 503 is a summary of the specific latter well-determination process (App., 11a-12a). The Court also did not refer to the significance of the facts that (i) Section 503 was intended to provide for determinations by jurisdictional agencies by the *application* of *statutory* or *regulatory criteria*; (ii) under Section 503(a)(2), *the Commission* is authorized to issue rules *under Section 501* setting out the substantiation and the manner jurisdictional agencies are to file their determinations with the Commission, 15 U.S.C. §§ 3413(a)(2) (App., 86a); and (iii) under Section 503(c)(3), the Commission may prescribe the form and content of filings with the jurisdictional agency in connection with determinations under Section 503, 15 U.S.C. § 3413(c)(3) (App., 89a-90a).

[32] *See Texas Eastern Corp.* v. *FERC*, 769 F.2d 1053 (5th Cir. 1985), cert. den., 476 U.S. 1114 (1986); *Union Texas Petroleum Corp.* v. *FERC*, 721 F.2d 146 (5th Cir. 1983); *Process Gas Consumers* v. *U.S. Department of Agriculture*, 657 F.2d 459, 463 (5th Cir. 1981); *Falcon Petroleum* v. *FERC*, 642 F.2d 780 (5th Cir. 1981); *Ecee Inc.* v. *FERC*, 611 F.2d 554, 563 (5th Cir. 1980).

orders as it may find necessary or appropriate to carry out its functions under this Act." 15 U.S.C. § 3314 and 15 U.S.C. § 717o. Section 16 has been construed to provide broad rulemaking power, requiring deference by the courts.[33]

The court of appeals should have accorded the same deference here to the Commission's exercise of rulemaking power under Section 501. This is particularly true when the Commission was implementing discretionary authority under Sections 107(b) and 107(c)(5), which can be implemented *only* by Commission action under Section 501. The failure of the court below to recognize the broad powers provided to the Commission under Section 501 thus conflicts with the application of Section 501 in review of other Commission regulations prescribed under that section.

III. The Decision Below Conflicts With Other Principles Of Statutory Construction Set Forth By This Court.

While the principles of *Chevron* apply to this case, *Chevron* does not preclude the application of other principles stated by this Court where (i) Congress has not directly addressed, or is silent on, a precise question at issue—which is the case of methods and procedures to implement Sections 107(b) and 107(c)(5) in tandem with Section 503; or (ii) Congress is silent, but authorizes the Commission, by rule, to develop and administer discretionary authority—which is the case of procedures to implement Sections 107(b) and 107(c)(5). Under such circumstances, regulations should be upheld if they are permissible, reasonable constructions of the statute and should be given controlling weight. *Chevron*, 467 U.S., at 843-844.

Here, it cannot be reasonably concluded that Congress provided instructions as to procedures to implement Sec-

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[33] *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Texaco Inc.* v. *FPC*, 377 U.S. 33 (1964).

tions 107(b) and 107(b)(5), or that the scant legislative history cited by the court of appeals provides answers. Instead, the court has devised a construction that violates the principle that Congressional intent to preclude judicial review should not be presumed, but clearly expressed by "clear and convincing evidence." [34]

Under these circumstances, where there is no express or implied intent of Congress to limit the use of jurisdictional agencies as a part of the Section 501 rulemaking process to determine eligible "tight formations" under Sections 107(b) and 107(c)(5), the court of appeals should have given deference to the Commission's determination.[35] The Commission interpretation is sufficiently reasonable; [36] there are no compelling reasons that it is wrong; [37] and the court needed only to conclude that the agency interpretation was reasonable to uphold it.[38]

The court should not, as here, attempt to substitute its own judgment for that of the agency. *American Trucking Associations* v. *United States*, 344 U.S. 298, 309-10 (1953). Deference, particularly on such procedural regulations, must be accorded to the agency. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).[39] Deference is particularly appropriate where precise procedures were not prescribed by Congress; broad rulemaking power is provided; and the Com-

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[34] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). *See also Bowen* v. *Michigan Academy*, 476 U.S. 667 (1986); *Rusk* v. *Cort*, 369 F.2d 367, 379-380 (1962).

[35] *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981).

[36] *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

[37] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

[38] *American Paper Institute Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402 (1983).

[39] *See also Pattern Makers League* v. *NLRB*, 473 U.S. 95 (1986); *Chemical Manufacturers Association* v. *NRDC*, 470 U.S. 116, (1985); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944).

mission regulations have been in effect and applied for almost eight years.[40]

IV. The Case Presents Novel Questions Of Importance In The Administration Of The Natural Gas Policy Act.

A primary objective of Congress in passage of the NGPA was to avoid future shortages by providing for incentive pricing, and Section 107(b) was intended as a major provision to accomplish this objective. The Commission is permitted to prescribe special incentive prices for tight formations that required producers to undertake "extraordinary risks or costs."[41] The program has been successful and has contributed to the elimination of the shortage and ample supplies of natural gas for consumers.[42]

The holding below now has raised questions as to orders issued under Sections 107(b) and (c)(5) and the regulations under Order Nos. 99 and 99-A. While the court disclaimed intent to pass on validity of the underlying regulations (App., 12a, n.36), the decision has generated allegations that the court's decision means that the regulations and orders issued under these regulations are invalid.[43] As noted *supra*, page 18, n.28, the Commission has revised its regulations with prospective effect from July 29, 1987, but these regulations, based upon Section 503, may be invalid if it is correct that Congress contemplated action through Sections 107(b), 107(c)(5),

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[40] *See Train* v. *NRDC*, 421 U.S. 60, 87 (1975).

[41] H.R. Rep. No. 95-1752 at 87.

[42] For example, the Commission lifted the shortage-induced curtailment plan and growth limitations on Williston's system in 1986. *Williston Basin Interstate Pipeline Company*, 35 F.E.R.C. (CCH) ¶ 61,077 (1986).

[43] For example, Williston made the assertion that the holding below means that the regulations under Order Nos. 99 and 99-A are invalid. "Petition for Rehearing and Suggestion for Rehearing *En Banc*," filed June 8, 1987, by Williston below.

and 501, and are so questioned. The holding below also has generated uncertainty, and questions as to retroactive application of the holding and as to the status of tight formation designation orders issued prior to July 29, 1987.

The holding below is erroneous. Only review by this Court can reverse that decision, eliminate uncertainty the decision has created, and forestall the administrative and judicial litigation that has followed and will follow issuance of the decision below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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